(3)

FILED

MAY 6 1996

CLERK

No. 95-1491

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

D.F.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

700

TABLE OF AUTHORITIES

Cases:	Page
Ashcraft v. *Tennessee*, 322 U.S. 143 (1944)	4
Crane v. *Kentucky*, 476 U.S. 683 (1986)	2, 5
First Options of Chicago, Inc. v. *Kaplan*, 115 S. Ct. 1920 (1995)	2
Miller v. *Fenton*, 474 U.S. 104 (1985)	*passim*
Mincey v. *Arizona*, 437 U.S. 385 (1978)	4
Pierce v. *Underwood*, 487 U.S. 552 (1988)	2
Salve Regina College v. *Russell*, 499 U.S. 225 (1991)	2
Thompson v. *Keohane*, 116 S. Ct. 457 (1995)	4
Constitution and statutes:	
U.S. Const.:	
Amend. IV	4
Amend. V (Due Process Clause)	5
18 U.S.C. 2254(d)	2
18 U.S.C. 3501(a)	5

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1491

UNITED STATES OF AMERICA, PETITIONER

v.

D.F.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent agrees that our petition should be granted. Resp. Br. 6-7. She acknowledges that every court of appeals except the Seventh Circuit has required *de novo* review of involuntary-confession claims, *id.* at 6, that the issue "has broad importance," *ibid.*, and that the standard of review may have determined the result in the court of appeals in this case, *id.* at 7. She disagrees only with our request for summary reversal. None of the reasons she gives, however, would support affirmance of the decision below.

1. Respondent suggests that the Court should distinguish *Miller* v. *Fenton*, 474 U.S. 104 (1985), and the earlier decisions on which it relied, because those cases involved federal review of state court determi-

nations, rather than direct appeals in federal criminal cases. Resp. Br. 8-13. That proposed distinction is unfounded. See Pet. 17-18.

While *Miller* did arise in the context of federal habeas review, the principal basis of the Court's decision was that "the ultimate issue of 'voluntariness' is a legal question." 474 U.S. at 110; see *id.* at 115 ("it would be inappropriate to abandon the Court's longstanding position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry"); see also *Crane* v. *Kentucky*, 476 U.S. 683, 688 (1986) (voluntariness of a confession is a "purely legal question"). The legal nature of the inquiry was dispositive in *Miller* because the presumption of correctness under 18 U.S.C. 2254(d) applies only to questions of fact. It is equally well established that federal appellate courts, reviewing federal district court decisions, "accept[] findings of fact that are not 'clearly erroneous' but decid[e] questions of law *de novo*." *First Options of Chicago, Inc.* v. *Kaplan*, 115 S. Ct. 1920, 1926 (1995); see *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988); *Salve Regina College* v. *Russell*, 499 U.S. 225, 231-233 (1991). There is not a single federal constitutional issue of which we are aware—and respondent refers to none—that the federal courts consider "legal" when decided by a state court, but "factual" when decided by a federal district court.[1]

---

[1] Respondent suggests (Br. 8) that *Miller* may be limited to a district court's initial collateral review of state-court judgments, and that it is inapplicable to appellate review. The Court in *Miller*, however, referred interchangeably to "independent federal *or appellate* review," 474 U.S. at 114 (emphasis added), and relied not only on collateral-review precedents, but also on cases decided on direct appeal, *id.* at 110-111; see also

Respondent contends that, even if *Miller* controls here, the question whether the staff at the county Mental Health Center acted as law enforcement surrogates in receiving her confessions is a factual question subject to review for clear error. Resp. Br. 12-13. But, as we pointed out in our petition, the issue of whether the government crossed the line between treatment and coercion cannot be resolved without considering "the types of government action that, in the circumstances of the case, are incompatible with due process." Pet. 23. Although the factual question of what the Center staff said and did is subject to review for clear error, the "ultimate issue" of "whether the State has obtained the confession in a manner that comports with due process" is precisely the kind of legal question that, as this Court held in *Miller*, is subject to *de novo* review. 474 U.S. at 110, 115-116.

2. Respondent suggests (Br. 7, 13-19) that *de novo* review is inappropriate with respect to a determination of voluntariness because that question has an "unavoidably * * * subjective" component. In *Miller*, however, the Court expressly noted that the voluntariness inquiry has a subjective component, in that the inquiry turns in part on "whether the defendant's will was in fact overborne." 474 U.S. at 116. Nevertheless, the Court reaffirmed its earlier decisions holding that the ultimate conclusion on voluntariness remained a "legal question requiring federal determination." *Ibid.* Indeed, the Court observed

---

Resp. Br. 10; Pet. 17 n.6. Moreover, as respondent points out (Br. 8 n.5), the Court in *Miller* itself expressly required the court of appeals to conduct plenary review on remand. 474 U.S. at 118.

that the "hybrid quality" of the voluntariness inquiry "itself militates against treating the question as one of simple historical fact" amenable to review for clear error. *Ibid.*

While respondent seeks to bifurcate the voluntariness line of cases into two distinct strands, Resp. Br. 16-19, *Miller* makes clear that *de novo* review applies not only where "the claim is that the police conduct was 'inherently coercive,'" 474 U.S. at 110 (quoting *Ashcraft* v. *Tennessee*, 322 U.S. 143, 154 (1944)), but also where "the interrogation techniques were improper only because, in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will." 474 U.S. at 110 (citing *Mincey* v. *Arizona*, 437 U.S. 385, 401 (1978)). The Court reasoned that, "[b]ecause the ultimate issue in both categories of cases is the same—whether the State has obtained the confession in a manner that comports with due process—the decisions leave no doubt that our independent obligation to decide the constitutional question is identical." 474 U.S. at 110.[2]

---

[2] Respondent notes (Br. 13-14) that two cases this Term present questions of the proper standard of review of issues arising in state and federal criminal prosecutions, see *Thompson* v. *Keohane*, 116 S. Ct. 457 (1995) ("in custody" determinations for *Miranda* purposes); *Ornelas* v. *United States*, No. 95-5257 (argued March 26, 1996) (reasonable suspicion and probable cause determinations for Fourth Amendment purposes). Respondent also notes that the legal issues in those cases involve purely objective determinations based on a reasonable-person test, in contrast to the hybrid character of the voluntariness determination. More fundamentally, however, this case differs from those in that the Court has already made clear that voluntariness is a legal issue subject to independent federal review.

3. Finally, respondent points out that, once a court has held a confession to be voluntary and therefore admissible, evidence regarding voluntariness may also be submitted to the jury. Resp. Br. 20-24. Respondent contends that, in view of that procedure, "it would be unusual for federal appellate courts to undertake *de novo* review," because jury determinations ordinarily are reviewed deferentially. *Id.* at 22-23. *Miller* requires *de novo* review, however, only of the district court's threshold constitutional determination that respondent's confessions were involuntary under the Due Process Clause. That question is wholly independent of any jury issue. The appropriate standard of review of a jury's decision regarding how much weight, if any, to accord a properly admitted confession (see 18 U.S.C. 3501(a); *Crane*, 476 U.S. at 688-692) is a question not presented by this case. As this Court made clear in *Crane*, evidence of "the circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual." 476 U.S. at 688. The propriety of *de novo* review of the legal question is unaffected by the "entirely independent" factual questions addressed by juries after confessions are properly admitted. *Id.* at 689.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MAY 1996